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May 20, 1998

Marjorie W. Emmons
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4546 (Friends for Jack Metcalf Committee
and Frank McCord, as treasurer)

Dear Ms. Emmons:

Enclosed please find 10 copies of Respondent's Brief in the above captioned matter.

Sincerely,


Jan Witold Baran

cc:  Office of General Counsel (w/3 copies)

RECEIVED
FEDERAL ELECTION COMMISSION
MAY 20 4 22 PM '98

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Friends for Jack Metcalf and Frank) MUR 4546
McCord, as treasurer)

RESPONDENT'S BRIEF

This brief is filed on behalf of Friends for Jack Metcalf and Frank McCord, treasurer, pursuant to 2 U.S.C. § 437g(a)(3). It responds to the arguments made in the General Counsel's Brief in Matter Under Review ("MUR") 4546, received April 15, 1998.

The General Counsel has recommended that the Commission find probable cause to believe that Friends for Jack Metcalf ("Committee") and Frank McCord, treasurer, violated 2 U.S.C. § 434(b)(3)(A), by not providing the required contributor identification information in its 1996 April, July, and October Quarterly Reports filed with the FEC, and by not conforming to the requirements of the best efforts safe harbor set forth in FEC regulations at 11 C.F.R. § 104.7. For the reasons stated below, the FEC should not find probable cause to believe that the Act was violated.

FACTS

Friends for Jack Metcalf is the authorized committee of Congressman Jack Metcalf, who represents Washington State's Second District. The facts related here are based upon the sworn affidavits and documents filed on December 1, 1997 with the Commission, which are hereby incorporated by reference into this brief.

During the 1995-96 election cycle, Friends for Jack Metcalf used a CPA firm to prepare and file its FEC reports. A secretary at the firm would notify the campaign of missing contributor information. The campaign staff would make calls to find the information, then contact the secretary. She would input that information into the committee's computer program and file it in her files for future reference.

In July of 1996, after the Committee received a notice from the FEC, campaign manager Kevin McDermott called the named Reports Analyst, Tracy (Slade) Tiell, and asked her how the Committee should respond. He recalls that Tiell recommended that the Committee send a letter to contributors who had not provided that information, requesting that they do so. McDermott

drafted and sent this letter. After the Committee received its copy of the Democratic Party's complaint in November, McDermott again asked Tiell what they should do. McDermott recalls being told that the campaign's reports should be amended to add the occupation and employer information. The campaign went through its records, asked staff to identify donors, and filed amendments in May and in November 1997.

Friends For Jack Metcalf did not deliberately conceal the sources of contributions, as alleged in the Complaint. When contributor identification information was missing, campaign staff attempted to obtain the information through a variety of means. A review of the amendments to the Committee's reports shows no evidence that Friends for Jack Metcalf was "concealing" support from a particular special interest. At present, Friends for Jack Metcalf has instituted procedures designed to ensure that future reports contain occupation and employer information for campaign donors.

DISCUSSION

I. Good Faith Efforts to Comply Not Mentioned in General Counsel's Brief.

At the outset, the Committee would like to call the Commission's attention to aspects of this MUR that are not discussed in the General Counsel's brief. The General Counsel's office states that the Committee launched its efforts to obtain occupation and employer information only after receiving a letter from the FEC, by drafting a letter to send to contributors for whom the Committee lacked information in July, 1996. In its description of the Committee's efforts to correct its reports, the General Counsel's brief also takes the Committee to task for the tardiness of the Committee's amendments.

However, the General Counsel's brief neglects to describe the role played by FEC staff. The Committee sought to comply with FEC requirements by querying the Reports Analyst whose name appeared on FEC correspondence. Kevin McDermott, the campaign manager, stated the following in his sworn statement provided in the Committee's December 1, 1997 response:

7. In July of 1996, the Committee received a letter from the FEC requesting occupation and employer information for donors reported on our FEC reports. I discussed this letter with Don Jonas and Sally Kruse [who helped prepare the Committee's reports]. I then called the FEC staff analyst who signed the letter, Tracy (Slade) Tiell. I asked her what we should do. She recommended that we send a follow-up letter to all donors for whom we lacked occupation and employer information, asking them to provide the information. I drafted a form letter containing this request, and followed our general practice of having volunteers copy the letters, stuff them into envelopes, and address the envelopes by hand. I recall using our FEC reports for an address list. The letter[s] were then mailed to the donors.

8. I provided a copy of the letter sent to donors to the FEC. [] Although that copy was dated October 16, 1996, copies like it were sent out earlier th[a]n that date. I recall letters being sent in late July or early August in the large mailing to all donors on our FEC reports for whom we lacked occupation and employer information. The copy forwarded to the FEC shows the "October 16, 1996" date because the letter was written with a date code feature that would update the date each time the letter was printed. . . .

13. I left Washington State after the campaign. As the FEC would contact the campaign about its filings, I recall being called by Lew Moore. I recall I then called Tracy Tiell at the FEC, and in a series of conversations with her I attempted to rectify the situation. In these conversations, I asked her about what steps the Committee should take. She said that we should amend our reports. . . .

The Committee first filed amendments in May 1997, following this advice, to 1996 reports not at issue in this MUR. Kevin McDermott continued:

14. I was never advised to contact any other staff person at the FEC. I continued to contact Tracy Tiell because she had been my contact throughout the election cycle, and I thought she was the staff person who would be most able to help me with my questions.

15. In particular, Tracy Tiell suggested that our committee file a description with the FEC of the present procedures we used to obtain occupation and employer information for donors. Accordingly, on June 30, 1997, I wrote the FEC with a description of this process. []

Statement of Kevin McDermott (filed December 1, 1997, copy attached). Other staff members confirmed in their sworn statements that they recall that at this time McDermott had been speaking with staff at the FEC. See Statement of Lew Moore ¶ 7; Statement of Christopher Strow ¶ 9 (filed December 1, 1997, copies attached). McDermott (and other Committee staff) assumed that contacting the FEC was the most direct and effective method to use to address issues raised by their reports. It appears that the Committee did as it was told by RAD staff. Yet nowhere does the General Counsel credit the Committee with making these efforts.

II. Finding Probable Cause Here Would Be Inconsistent With the Commission's Disposition of Other "Best Efforts" MURs.

The General Counsel also emphasizes that the Committee's present compliance policies and its amendments to its reports are not relevant to whether it followed the requirements of 2 U.S.C. § 434(b)(3)(A) and 11 C.F.R. § 104.7. In fact it is relevant to the Commission's inquiry that the Committee has amended (albeit late) the Quarterly reports at issue to reach a compliance rate by our calculations of about 96.5% for the April 15, 1996 Report, 92% for the July 15, 1996

report, and 95% for the October 15, 1996 report. We also note that FEC regulations do not oblige committees to amend their reports for previous election cycles. See 11 C.F.R. § 104.7(b)(4)(i).

It therefore seems odd that the FEC would use its scarce enforcement resources to pursue the Committee. Indeed, it appears that this MUR is unusual in that regard. Previous MURs that present similar factual situations have been closed with no action taken by the General Counsel's office, frequently because that office determined that its resources should be used to pursue more significant matters.¹ Our research found that, out of 21 "best efforts" MURs, the FEC has pursued only one case.²

For example, in MUR 4271, an audit concluded (among other issues) that People for English was missing occupation and employer information for about 40% of its donors. People for English could not document its efforts to obtain this information from donors, and the FEC's audit staff concluded that the requirements of the "best efforts" regulation had not been met. Nevertheless, when referring these matters to the General Counsel, the audit division wrote: "It is the opinion of the Audit staff that pursuing as compliance matters . . . the disclosure of occupation and name of employer may not constitute the most efficient use of Commission resources." Memorandum to Lawrence M. Noble from Robert J. Costa 1 (Oct. 3, 1995) (MUR 4271). The General Counsel concluded that MUR 4271 did not warrant pursuit "relative to other pending matters" and the Commission voted by 5-0 to take no further action in the matter on February 27, 1997.

In MUR 4127, the complainant alleged (among other things) that NARAL-PAC engaged in "consistent, almost routine, omission of employer and occupation information" and requested an FEC investigation. In NARAL-PAC's response, it noted that it had been in correspondence with FEC staff, and "had instituted additional mechanisms to ensure on-going compliance with the "best efforts" requirements . . ." NARAL-PAC continued:

Not only is NARAL-PAC in compliance on a going-forward basis, but NARAL-PAC has also made a good faith effort to rectify any potential past lapses. NARAL-PAC has contacted all contributors whose contributions have exceeded \$200 since the effective date of the "best efforts" regulation and requested the

¹ Our research attempted to identify all MURs closed from January 1, 1996 to the present in which the respondent's identification of the occupation and employer of contributors or "best efforts" compliance was raised as an issue. We identified the following MURs: (closed in 1996) 4033; 4044; 4066; 4067; 4111; 4113; 4127; 4165; 4184; 4348; (closed in 1997) 4167; 4172; 4271; 4273; 4332; 4422; (closed in 1998) 4170; 4435; 4542; 4567; 4696.

² MUR 4167 (Republican National Committee). The RNC was concurrently pursuing litigation with the FEC over that standard's legality in federal court (see MUR 4167, closed April 4, 1997).

required information a second time from those donors who have not yet provided it. [] Contributor information received as a result of this effort will be reported to the FEC in accordance with federal regulations.

Letter from Nicole M. McLaughlin, counsel for NARAL-PAC, to Mary Taksar, Esq. 5 (Dec. 21, 1994) (MUR 4127). No additional action was taken in that matter. The General Counsel's office recommended that the Commission not pursue MUR 4127 as stale, and the Commission closed the file effective February 13, 1996.

Other MURs based upon complaints alleging "best efforts" violations have also been closed summarily without action on the FEC's part. These include MUR 4422 (James DeSana and DeSana for Congress, opened July 30, 1996, closed as stale Aug. 29, 1997); MUR 4332 (Bill Thomas Campaign Committee, opened March 27, 1996, closed as not warranting pursuit April 1, 1997); MUR 4165 (Manfre for Congress, opened Dec. 20, 1994, closed as not warranting pursuit March 5, 1996); MUR 4113 (Tucker for Congress, opened Oct. 31, 1994, closed as stale March 5, 1996); MUR 4111 (Van Hilleary for Congress, opened Oct. 31, 1994, closed as stale March 5, 1996); MUR 4066 (Committee to Elect Paul Bucha, opened Sept. 27, 1994, closed as stale March 5, 1996); MUR 4033 (Fox for Congress, opened Aug. 11, 1994, closed as stale March 5, 1996).

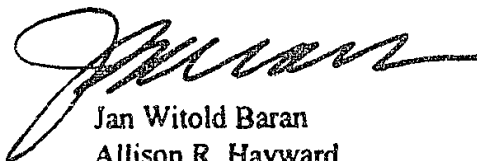
Moreover, in MURs 4113, 4111, 4066, and 4033, the MUR files indicate that the campaigns under scrutiny did not ever respond in any way to the allegations, even though the allegations appear to raise serious compliance issues. See MUR 4113 (allegation that campaign failed to provide information for "hundreds upon hundreds" of contributors and vendors); MUR 4111 (allegation that campaign failed to provide occupation and employer information for at least 22 individual contributors); MUR 4066 (allegation that campaign reported incomplete information for 70% of contributors, also alleging that candidate was deliberately obscuring source of support); MUR 4033 (allegation that campaign failed to disclose occupation/employer information for \$86,595 in contributions). In MUR 4422, the respondent campaign, which allegedly failed to provide occupation and employer information for 77 donors, stated in response only that it "has put forth its best effort" and that it was working to correct its reports "with the appropriate FEC personnel (Pat Sheppard) on such matters." (Pat Sheppard, like Tracy Tiell, is a Reports Analyst.) MUR 4422 was closed as stale on August 29, 1997, about a year after it was opened.

Our review of the FEC's enforcement in this area demonstrates that "best efforts" allegations are not pursued, especially after remedial action by the respondent. Unlike many of the parties listed above, Friends for Jack Metcalf did work with FEC staff in an effort to fix its reports. In a similar action, NARAL-PAC's claims that it had amended past reports and was in prospective compliance led, not to further inquiry or penalties, but instead to closure by the General Counsel's office.

CONCLUSION

Therefore, unless the General Counsel's office can demonstrate that the circumstances here justify different treatment of Friends for Jack Metcalf in MUR 4546, we urge that the Commission not find probable cause to believe that Friends for Jack Metcalf for Congress and Frank McCord, Treasurer violated 2 U.S.C. § 434(b)(3)(A), and close this matter.

Respectfully Submitted,



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(202) 429-7000

Counsel for Friends for Jack Metcalf and
Frank McCord, Treasurer

Enclosures

Statement of Kevin McDermott

COPY

1. I, Kevin McDermott, served as Congressman Jack Metcalf's campaign manager for his 1996 reelection campaign. I served in this position from February 2, 1996 to about November 20, 1996. I was responsible for the overall day-to-day management of the campaign.
2. Among my responsibilities was to pick up and sort the mail delivered to the campaign's mailbox. I would receive the mail from the post office box, then take it to the Davis & Jonas CPA office next door, where I would sort the mail. When campaign contributions arrived, I would leave the checks and copies of any identification information with Davis & Jonas. Envelopes with address changes, and donor envelopes with other information required to update our direct mailing lists were given to Kris Wilder.
3. Kris Wilder contracted with Friends for Jack Metcalf to provide direct mail services. The direct mail effort began before I joined the campaign. Kris Wilder printed the materials for the direct mail, including a multipurpose business reply envelope for the campaign's use. I recognize both the "Thank You! Metcalf '96" envelope and the envelope used to record the contribution of Herman Etcheto as envelopes that were used by the campaign. [See Tabs 3A & 3B.] I cannot recall on what occasions each particular envelope was used.
4. Davis & Jonas was responsible for compiling and filing the FEC reports for Friends for Jack Metcalf. I recall that the firm was hired by the Committee in part to prevent reporting problems such as those experienced by previous campaign committees authorized by Congressman Metcalf.
5. Sally Kruse input donor information onto the Davis & Jonas computer system. She would note what information was missing for contributors, and would contact the campaign so that

we could obtain the information for the reports. Sometimes Sally wrote notes to the campaign staff requesting this information. Although I do not recognize it specifically, the typewritten note addressed to me requesting information on "Port Blakely Tree Farms LP" looks like one of these notes. [See Tab 3C.] Other times, Sally would call and request information from campaign staff over the telephone.

6. Erik Strom helped me obtain this information for Sally, as did volunteers who helped out in the campaign office. I would usually call Sally with the information. Sometimes, I wrote the information down and faxed it to her. The note containing information about "John Postema" is in my handwriting and would have been one of the notes I wrote her to give her donor information. [See Tab 3D].
7. In July of 1996, the Committee received a letter from the FEC requesting occupation and employer information for donors reported on our FEC reports. I discussed this letter with Don Jonas and Sally Kruse. I then called the FEC staff analyst who signed the letter, Tracy (Slade) Tiell. I asked her what we should do. She recommended that we send a follow-up letter to all donors for whom we lacked occupation and employer information, asking them to provide the information. I drafted a form letter containing this request, and followed our general practice of having volunteers copy the letters, stuff them into envelopes, and address the envelopes by hand. I recall using our FEC reports for an address list. The letter were then mailed to the donors.
8. I provided a copy of the letter sent to donors to the FEC. [See Tab 3F.] Although that copy was dated October 16, 1996, copies like it were sent out earlier than that date. I recall letters being sent in late July or early August in the large mailing to all donors on our FEC reports for whom we lacked occupation and employer information. The copy forwarded to the FEC

shows the "October 16, 1996" date because the letter was written with a date code feature that would update the date each time the letter was printed. The feature was part of the letter template I used for my campaign correspondence. The letter was written on a rented computer that has since been returned, and I did not keep a copy on a disk to demonstrate how the document was configured.

9. I received a few responses from this letter, which I then forwarded to Sally Kruse so she could input the information into our computer files.
10. The campaign staff at my direction also obtained occupation and employer information for donors by looking the names up in local directories and by calling them directly. I recall that Erik Strom helped me with this project.
11. I first learned about the complaint filed by the Washington State Democratic Party in October, when our campaign was called by local press seeking comment on the complaint. We also received a copy of the complaint from the FEC.
12. After the election, I packed the campaign office with Erik Strom. We kept about 6 boxes of campaign materials, which were stored in campaign office space in Everett, Washington.
13. I left Washington State after the campaign. As the FEC would contact the campaign about its filings, I recall being called by Lew Moore. I recall then called Tracy Tiell at the FEC, and in a series of conversations with her I attempted to rectify the situation. In these conversations, I asked her about what steps the Committee should take. She said that we should amend our reports. Since I was no longer in Everett, Washington, I recall that I passed her advice along to Metcalf's district staff. It is my understanding that the campaign obtained additional occupation and employer information and amended the committee's reports.

14. I was never advised to contact any other staff person at the FEC. I continued to contact Tracy Tiell because she had been my contact throughout the election cycle, and I thought she was the staff person who would be most able to help me with my questions.

15. In particular, Tracy Tiell suggested that our committee file a description with the FEC of the present procedures we used to obtain occupation and employer information for donors.

Accordingly, on June 30, 1997, I wrote the FEC with a description of this process. [Tab 3G]

16. I anticipated that the amendments and these other responses to the FEC were under consideration for all matters related to Friends for Jack Metcalf, including the complaint filed by the Washington State Democratic Party.

Further affiant sayeth not.

Kevin McDermott

Sworn and subscribed to
before me this ____ day of
November, 1997.

Notary Public

My Commission expires: _____

COPY

Statement of Christopher Strow

1. My name is Christopher Strow and I am Congressman Metcalf's Administrative Assistant.
2. In October, 1997, I volunteered to assist the Congressman in collecting the documents requested by the FEC in its letter dated October 2, 1997.
3. I have inspected the campaign documents stored in Everett, Washington for any materials responsive to the Subpoena. I found about nine boxes of documents in total; 4 from the 1994 campaign and 5 from the 1996 campaign.
4. I also inspected the campaign computer stored with these boxes, and the desk in storage that was used in the campaign.
5. I inspected the Metcalf files at Davis & Jonas, the campaign's accounting firm.
6. I inspected a campaign computer stored at the home of Kirk Pearson in Everett, Washington, on the evening of November 17, 1997. I copied the documents on this computer onto a floppy disk, which I delivered to counsel. I tried unsuccessfully to open some documents to ascertain their relevance in this matter, but I did not alter the text of any document. [See Tab 3L].
7. In an effort to locate all responsive documents, I contacted Kevin McDermott, the campaign manager; Kirk Pearson, the campaign field director; Don Jonas and Sally Kruse of Davis & Jonas; Erik Strom, the campaign finance director; Lew Moore, Congressman Metcalf's Chief of Staff; Kris Wilder, who provided Friends for Metcalf with direct mail services; Rescon, the campaign mail house; Jerry Moirer, a printer used by the campaign in Everett,

Washington, and Raquel Vidal, a campaign volunteer. I have asked each of these individuals to provide me with copies of any responsive documents they may have in their possession.

8. I have turned over originals or copies of any responsive documents I have located to our counsel, to be submitted with the Friends for Jack Metcalf subpoena response in MUR 4546. [See Tab 3I].
9. In preparation for Congressman Metcalf's 1998 reelection campaign, I have issued guidelines for campaign staff and accountants to follow so that future FEC reports are completed in accord with the requirements of federal law. [See Tab 3J]. I also am aware that the campaign's accountants have mailed requests for information to donors for whom the campaign still lacks occupation and employee information. [See Tab 3K]. I have also provided a copy of the donor envelope currently used by the Metcalf campaign. [See Tab 3M].

Further affiant sayeth not.

Christopher Strow

Sworn and subscribed to
before me this ____ day of
November, 1997.

Notary Public

My Commission expires: _____

COPY

Statement of Lew Moore

1. I, Lew Moore, am Chief of Staff for Congressman Jack Metcalf. I have held this position since July 1, 1995.
2. I volunteered my spare time to assist Congressman Metcalf's reelection campaign. I drafted speeches, and attended events and strategy meetings.
3. The first notice I had that our campaign's FEC filings had not properly identified the occupation and employer of donors was when local news reporters made inquiries about the complaint filed with the FEC by the Washington State Democratic Party.
4. I contacted Kevin McDermott and we discussed what measures should be taken to remedy the problem. We agreed that calls should be made to donors to obtain the necessary occupation and employer information from them. It was my understanding that we used campaign workers to make these calls.
5. In late November or early December, I received a printout of the names of donors for whom we did not have occupation and employer information from Sally Kruse. I read over the list, and could provide the information for several donors. I filled the information in and returned the list to Sally.
6. It was my understanding that the information from the phone calls and from reviewing the list of donors would be incorporated into amendments of our FEC reports.
7. I recall speaking with Kevin McDermott several times about whether the campaign's FEC filings were being corrected. He assured me that he was in touch with the FEC and that he

was doing what the FEC asked him to do to resolve the issue. In fact, in early 1997, I specifically remember seeing Kevin McDermott talking with the FEC over the telephone about our FEC reports.

Further affiant sayeth not.

Lew Moore

Sworn and subscribed to
before me this ____ day of
November, 1997.

Notary Public

My Commission expires: _____